COLUMBIA LAW REVIEW.

VOL. V. MAY, 1905 No. 5

DO WE NEED A PHILOSOPHY OF LAW?

Nothing in the history of our common law is more striking than its tenacity in holding ground. Like our English speech, there seems to be something about it that commends it to men of diverse lands and races, and where it once goes, it stays. From the beginning, it has been in competition, if not in conflict, with other systems, and it has steadily gained ground. On its own soil, it had to meet and resist the canon law in the twelfth century, the Roman law at the Renaissance, the powers of the crown exerted against its fundamental doctrine of the supremacy of law in the sixteenth and seventeenth centuries, the influx of foreign law through the law merchant in the eighteenth century, the legislative reform-movement in England and America in the nineteenth century, and in America, at the same time, a temporary but formidable agitation for French law, influenced by the spread of the Code Napoleon and the success of the Louisiana Civil Code. Not only has the common law as a system successfully resisted all attempts to bring in some other law in its place, but in those parts of our system where alien and more flexible methods have existed or have arisen, in contravention of the fundamental theory of the common law that litigation is contentious, and wherever arbitrary discretion has obtained a serious foothold, the common law ultimately has prevailed. Probate, administration, and divorce have been absorbed into our American common law.[1] Case-law and

[1] Crump *v.* Morgan (N. C. 1843) 3 Ired. Eq. 91; Le Barron *v.* Le Barron (1862) 35 Vt. 365.

precedent have turned admiralty into a common-law mould. Equity and equity procedure have been legalized. Precedent and case-law in the one, and the doctrine of contentious procedure in the other, have effectually made them over to the common-law model. Evidence in equity is now governed by rules framed to regulate the admission of evidence before juries; common-law executions are issued on decrees for the payment of money, though courts admit that contempt proceedings might sometimes be proper;[1] exemption laws, effective against executions, are defying equitable principles as to trusts and trust funds;[2] and more than one equitable doctrine has become so legalized as to run counter on occasion to the justice and equity which were its original foundation.[3] So far has this gone, that an acute observer has laid it down as a principle of legal science that the judicial administration of justice is intrinsically contentious.[4]

On what we may fairly term foreign soil, the common law has been no less aggressive and tenacious. Louisiana alone, of the states carved from the Louisiana purchase, preserves the French law. In Texas, only a few anomalies in procedure serve to remind us that another system once prevailed in that domain. Only historians know that the Custom of Paris once governed in Michigan and Wisconsin. And in Louisiana, not only is the criminal law wholly English, but the fundamental common-law doctrines, supremacy of law, case-law, and contentious procedure, are likely to make the legal system of that state a common-law system in all but its terminology. In Quebec, likewise, there are many significant signs of common-law influence. The Roman Dutch law of South Africa is adopting English conceptions.[5] Finally, even Scotland, which received the Roman law in the sixteenth century, is becoming a common-law country. Except as it lingers in their legal vocabulary, the Scotch have almost abandoned Roman law in all their courts.[6] From these examples, it

[1] Stuart *v.* Burcham (1901) 62 Neb. 84.

[2] Green *v.* Simon (1897) 17 Ind. App. 360.

[3] Willson *v.* Louisville Trust Co. (1898) 102 Ky. 522; Foster v. Reeves [1892] 2 Q. B. 255.

[4] Salmond, Jurisprudence, sec. 30. [5] 20 Law Quarterly Rev. 349.

[6] Professor Dove Wilson in 16 Juridical Rev. 68.

is easy to see what will be the fate of the existing system in Porto Rico and the Philippines. Whether it is the innate excellence of our legal system or the innate cocksureness of the people that live under it, so that, even as Mr. Podsnap talked to the Frenchman as if he were a deaf child, we assume that our common-law notions are part of the legal order of nature, and are innocently unable to understand that any reasonable being can harbor conceptions that run counter to them,[1] the Anglo-Saxon refuses to be ruled by any other law. Maine's supposition that the newer states of the union would take the Louisiana code for the substratum of their law, and his prophecy that Roman law would become the *lingua franca* of universal jurisprudence,[2] have proved wide of the mark.

An achievement strictly in line with the history of the common law is the intrenchment of its doctrines in our constitutions, state and federal, culminating in the Fourteenth Amendment, so that its fundamental and distinctive dogmas are beyond the reach of ordinary state-action, and are to be dislodged in many cases only by amendment of the federal constitution itself. This was not achieved without a struggle. Jefferson, in 1815, denounced the common-law doctrine of supremacy of law, when applied by courts in holding legislative acts unconstitutional, as a theft of jurisdiction. Virginia, Kentucky, Pennsylvania, Georgia and Wisconsin successively denounced it. A strong opinion to the contrary was pronounced by an able judge.[3] As late as 1833, it was seriously proposed that the federal constitution be amended to provide a special tribunal for the determination of questions as to the authority of Congress and of the several states under the constitution.[4] But despite opposition, which at the time of the federal enforcement of the constitutional provision as to fugitive slaves became extremely bitter, the common-law principle has become firmly rooted in our polity. No state has departed from it, and one of the

[1] Cutting's Case, Snow, Cases on International Law 172.

[2] Village Communities, 330 (written 1856).

[3] Eakin *v.* Raub (Pa. 1825) 12 S. & R. 330.

[4] An excellent account of this agitation may be found in an address by Judge Lurton, Proc. Bar Assn. Tenn. 1903, p. 125.

states which formerly agitated for referring constitutional questions to a special, non-judicial tribunal, has since adopted a constitution in which the courts are expressly directed to declare the invalidity of unconstitutional legislation.[1] In addition to this far-reaching principle, which fixes the common-law doctrine of supremacy of law in our institutions, the common-law dogmas of inviolability of person and property, of the local character of criminal jurisdiction, of due process of law,—a phrase as old at least as the reign of Edward III,[2]—that private property can not be taken for private use, nor for public use without due compensation,—a doctrine as old as Magna Carta,[3]—that no one shall be compelled in any criminal prosecution to be a witness against himself, and of the right of trial by jury, with all that was meant thereby at common law,—all these dogmas are protected in state and federal constitutions so as to be substantially beyond the reach of legislation. If Coke were to come among us, he might miss the law of real property which he knew so minutely. Our law of contracts and our mercantile and corporation law would doubtless be unfamiliar. But he would be thoroughly at home in our constitutional law. There he would see the development and the fruition of his Second Institute. All that might surprise him would be that so much had been taken from and made of his labors with so little recognition of the source.

Superficially, then, the triumph of the common law seems assured. Nevertheless, jurists are by no means certain that this is so. The most obvious danger, and the one most frequently adverted to, is legislation. Thus, Professor Maitland says that with some hundred legislatures busy at law-making in the various common-law jurisdictions, "the unity of law is precarious," and that with unity much that is precious must disappear.[4] Likewise Brunner, writing, however, at a time when codes were more imminent than they are now, states that "the period of the uncontested supremacy of the common law appears

[1] See Judge Lurton's Address, l. c. page 117.

[2] 37 Edw. 3, Cap. 8; 2 Inst. 50.

[3] Magna Carta, Cap. 19, 21.

[4] English Law and the Renaissance, 33.

to be now passing away."[1] I cannot think, however, there is any real cause for apprehension from this quarter. I come to such a conclusion for two reasons. In the first place, there is little in legislation that is original. Legislatures imitate one another. One may number on his fingers the landmarks of legislation in common-law jurisdictions, and copies or adaptations of them have gone round the world. Secondly, everything indicates that codification, as such, is still far remote. The gradual codification now in progress is but a legislative restatement of particular departments of the common law. It promotes unity. It does not affect the system itself,—its basic dogmas and tenets,—in the least. Each statute is but a fresh starting-point for a new body of case-law. Moreover, general codification, when it comes, is almost certain, unless an entire change of feeling intervenes, to be a restatement of the common law in improved form, pruned of archaisms and antinomies, to be construed according to common-law principles, and in due time overlaid by a new growth of adjudicated cases. The failure of the New York Draft Codes to meet the requirements of good code-making has set back codification so thoroughly, that none of us are likely to see a codified common law. Nor are radical legislative innovations possible in America. For instance: the federal bankruptcy act goes a long way in mixing up legal, equitable, administrative and criminal jurisdiction. But the most serious innovation, and the only one of special significance, is thwarted by the intrenchment of the common law in the federal constitution. The act provides that the bankruptcy court may punish bankrupts, trustees, and other parties for violations thereof.[2] If this was meant, however, to give summary powers to the court, it failed to reckon with the Fifth Amendment to the federal constitution, which requires an indictment or presentment of a grand jury as an indispensable preliminary to prosecutions in any federal court.[3] If legislation, therefore, were all that was to be feared, I should feel confident that the common law was with us to stay.

[1] Sources of the Law of England (Hastie's Translation) 176.

[2] Bankruptcy Act of 1898, sec. 2 (4).

[3] Mackin *v.* U. S. (1886) 117 U. S. 348; *Ex parte* Wilson (1885) 114 U. S. 417.

To my mind, the real danger to the common law is in another quarter. Hitherto the people have been with it. When Henry II put bounds to the jurisdiction of the Church, when the barons with drawn swords exclaimed "*nolumus leges Angliæ mutare*," when the commons petitioned against the court of chancery, when Coke for the judges of England told James I that he ruled *sub Deo et lege*, when the Continental Congress resolved that the several colonies were entitled to the common law of England, the common-law side was the national and the popular side. But to-day the popular side is not that of the individual, but that of society. To-day, for the first time, the common law finds itself arrayed against the people; for the first time, instead of securing for them what they most prize, they know it chiefly as something that continually stands between them and what they desire. It cannot be denied that there is a growing popular dissatisfaction with our legal system. There is a feeling that it prevents everything and does nothing. Commissions and boards, with summary administrative and inquisitorial powers are called for, and courts are distrusted. Partly, of course, this is due to impatience of thorough search for the truth, exact ascertainment of the facts, and strict justice. When everybody may learn all the facts in ten minutes from the morning paper, why should it take six months to reach a fragment of them? But in large part this dissatisfaction has a real basis, and is well founded. No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual, and for the intrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age. A glance at one of the digests will show us where the courts find themselves to-day. Take the one subheading under constitutional law, "interference with the right of free contract," and notice the decisions. Three of them hold eight-hour laws unconstitutional;[1] two more hold statutes limiting the

[1] *Ex parte* Kubach (1890) 85 Cal. 274; Low *v.* Rees Ptg. Co. (1894) 41 Neb. 127; *In re* Eight Hour Law (1895) 21 Col. 29.

hours of labor unconstitutional;[1] four deny effect to statutes fixing the periods at which certain classes of laborers shall receive their wages;[2] another passes adversely on a statute prohibiting the practice of fines in cotton mills;[3] another deals in the same way with a statute prohibiting corporations from deducting from the wages of employes to establish hospital and relief funds;[4] three overturn acts regulating the measuring of coal for the purpose of fixing the compensation of miners;[5] two hold void statutes designed to prevent the payment of employes in store orders;[6] another passes adversely on an act requiring laborers on public contracts to be paid the prevailing rate of wages;[7] another denies effect to an act requiring railway corporations to furnish discharged employes a statement of the causes of their removal,[8] while another decides it unconstitutional to prevent employers from prohibiting their employes from joining unions or bringing pressure upon them to withdraw from unions to which they belong.[9] I do not criticize these decisions. As the law stands, I do not doubt they were rightly determined. But they serve to show that the right of the individual to contract as he pleases is upheld by our legal system at the expense of the right of society to stand between our laboring population and oppression. This right of the individual and this exaggerated respect for his right are common-law doctrines. And this means that a struggle is in progress between society and the common law; for the judicial power over unconstitutional legislation is in the right line of common law ideas. It is a plain consequence of the doctrine of

[1] Fiske *v.* People (1900) 188 Ill. 206; Cleveland *v.* Clements Bros. Const. Co. (1902) 67 Ohio St. 197.

[2] Godcharles *v.* Wigeman (1886) 113 Pa. St. 431; Frober *v.* People (1892) 141 Ill. 171; Leep v. St. Louis I. M. & S. R. Co. (1894) 58 Ark. 407; Republic Iron & Steel Co. *v.* State (Ind. 1903) 66 N. E. Rep. 1005.

[3] Com. *v.* Perry (1891) 155 Mass. 117.

[4] Kellyville Coal Co. *v.* Harrier (1904) 207 Ill. 624.

[5] Millett *v.* People (1886) 117 Ill. 294; *In re* House Bill No. 203 (1895) 21 Col. 27; *In re* Preston (1900) 63 Ohio St. 428.

[6] State *v.* Goodwill (1889) 33 W. Va. 179; State *v.* Fire Creek Coal & Coke Co. (1889) 33 W. Va. 188.

[7] People *v.* Coler (1901) 166 N. Y. 1.

[8] Wallace *v.* Georgia C. & N. R. Co. (1894) 94 Ga. 732.

[9] State *v.* Julow (1895) 129 Mo. 163.

the supremacy of law, and has developed from a line of precedents that run back to Magna Charta.[1]

Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only. In the seventeenth and eighteenth centuries, when the theory of the state of nature was dominant, this feature of our legal system made it popular. But to-day the isolated individual is no longer taken for the center of the universe. We see now that he is an abstraction, and has never had a concrete existence.[2] To-day, we look instead for liberty through society. We no longer hold that society exists entirely for the sake of the individual. We recognize that society is in some wise a co-worker with each in what he is and in what he does, and that what he does is quite as much wrought through him by society as wrought by himself alone. To parody a well-known formula, we are not so much concerned with the liberty of each limited only by the like liberties of all, as with the welfare of each, achieved through the welfare of the whole, whereby a wider and a surer liberty is assured to him. The common law, however, is concerned, not with social righteousness, but with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe. And this compels a narrow and one-sided view, as men look upon these questions at present.

To show that this is not overdrawn, let us turn to a classical statement of the common law doctrine:

"So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public, but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain it may be

[1] Besides the cases discussed in Coxe, Judicial Power and Unconstitutional Legislation, see Anonymous (1338) Y. B. Mich. 11 Edw. 3, No. 23; Reginald de Nerford's Case (1340) Y. B. Hil. 12 Edw. 3, No. 34. A recent writer, indeed, tells us that "the constitutional importance of Magna Charta is nothing but a myth invented by Coke when he wanted a stick to beat Charles I with." See 21 Law Quart. Rev. 6. But whatever may have been the case at first, by the reign of Edward I it had given rise to something very like our constitutional law. Cf. *Articla super Chartas* 29 Edw. I Cap. 2.

[2] Licy, Philosophy of Right (Hastie's Transl.) II, 3.

urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. *Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights.*"[1]

Our criminal law is a growing cause of popular discontent with the legal system. But the difficulty here again is exaggerated respect for the individual. Procedure, civil and criminal, has been contentious with us from the beginning. This respect for the individual keeps it so. "Litigation is a game, in which the court is umpire. The rules are in the knowledge of the court and will be declared and applied by it as required. It is for the parties to learn the rules and play the game correctly at their peril."[2] As Manson has put it, "Law is in the nature of a cock-fight, and the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs."[3] In other words, the common-law theory of litigation is that of a fair fist fight, according to the canons of the manly art, with a court to see fair play and prevent interference. Americans have gone much further in developing this common-law notion than they have in England. We strive in every way to restrain the trial judge and to insure the individual litigants a fair fight, unhampered by mere considerations of justice. To give them this fair play, we sacrifice public time and money; incidentally also,—for if all men are equal, their pocketbooks are not,—giving certain litigants a conspicuous advantage in reality through a theoretical equality. This desire to leave a free field for contention reaches the extreme limit of absurdity in Nebraska, in the eminently common-law provision in the constitution that the right to be heard in the Supreme Court on error or appeal shall not be denied,[4] a provision by virtue of which a claim for

[1] 1 Blackstone, Comm. 139.

[2] Pollock, Expansion of the Common Law, 32.

[3] 8 Law Quarterly Rev. 161.

[4] Const. Nebr., Art. 1, sec. 24. Compare Lord Holt in Ashby *v.* White (1704) 2 Ld. Raym. 938: "My brother Powell, indeed, thinks that an action on the case is not maintainable because here is no hurt or damage to the plaintiff; but surely every injury imparts a damage; a damage is not merely pecuniary; an injury imparts a damage when a man is hindered thereby of his right."

28 cents, after three trials, had to be passed on solemnly by the highest court of the state.[1] The individual, in short, gets so much fair play, that the public gets very little. There is nothing more glorious in our legal history than the judges of England telling the king that he ruled *sub Deo et lege*. And yet that very scene has resulted in constitutional doctrines that enable a fortified monopoly to shake its fist in the face of a people and defy investigation or regulation. Now that the common law has so thoroughly prevailed that legislative trial and punishment are abrogated, one may sometimes wonder whether lynchings are not our modern bills of pains and penalties. Is this common-law respect for the individual inherent and fundamental? Does it represent a sixteenth and seventeenth-century color, then acquired, or is it deeper seated and intrinsic? In other words, what is the spirit of the common law? Three characteristic doctrines set off the common law system from all others, namely, (1) the supremacy of law, (2) case-law and precedent, and (3) contentious procedure. The supremacy of law,—the doctrine that all questions may be tried in the course of orderly litigation between individuals, and that no person and no act is beyond the law,[2]—is the Germanic principle that the state is bound to act by law.[3] It is to be seen in Bracton's saying that the king is "under God and the Law," and is as old as our legal system. Our doctrine of precedents is almost as old. The first precedents were writs, and Glanvill's book is a collection of them. Bracton relied on the judgment rolls, and his Note Book is something very like a Report. Moreover we find the doctrine of the authority of adjudications in like cases stated at the beginning of the fourteenth century.[4] Contentious procedure is Germanic, and characterizes English law from before the Conquest.[5] But these three doctrines resolve themselves to a fundamental proposition

[1] Peterson *v.* Mannix, 2 Nebr. Unoff. 795.

[2] Dicey, Law of the Constitution 171.

[3] Gierke, Political Theories of the Middle Age 73, 74.

[4] Prior of Lewes *v.* Bishop of Ely (1304) Y. B. 32 Edw. 1 (Harwood's Ed.) 39.

[5] See Examples in Pollock, Expansion of the Common Law 32.

that law exists for individuals, and hence is to deal with every question as a contest between individuals, is to decide it on its individual facts, not arbitrarily, but as like cases have been adjudged for others, and is to allow the parties to fight out the contest for themselves, and as much as possible in their own way.

The contest between the people and the law reflected in our American constitutional law has a parallel in the prior contest between the king and the law. At common law the king was *parens patriæ*. He was charged with the duty of protecting the public interests, and he wielded something very like our modern police power. This power was limited on every side by the maxims of the common law, and the bounds set by the *lex terræ*.[1] A few examples may be noted. King Henry VI granted to the company of dyers in London the power to search for cloth dyed with poisonous dyes and to seize and confiscate it if found. This was held "against the law of the land" because there could be no forfeiture by virtue of letters patent.[2] Henry IV granted "the measuring of woolen cloth and canvas that should be brought to London by any stranger or denizen," taking a penny of the buyer and another of the seller for each piece measured. It was adjudged that "the said letters patent were *in onerationem, oppressionem, et depauperationem subditorum domini regis etc., et non in emendationem ejusdem populi;* and therefore the said letters patents were voyd."[3] Thus the common law, in the interest of the individual, is struggling with the prerogatives of the people, represented by the police power, as it struggled with a like prerogative of the crown from Henry VII to James II. But times have changed. The individual is secure and new interests must be guarded. The common law renders no service to-day by standing full-armored before individuals,

[1] E. g. *Le common ley ad tielment admeasure les prerogatives le roy que itz ne tolleront ne prejudiceront le inheritance dascum.* 2 Inst. 63.

[2] 2 Inst. 46–47.

[3] 2 Inst. 62. See also Davenant *v.* Hurdes (1599) 2 Inst. 47; Darcy *v.* Allen (1603) Mo. 671, 11 Rep. 84*b*. The preamble to the grant in this case recited that "whereas men of mean trades and occupations in the commonwealth apply themselves to idle games with cards," the queen made the grant "in restraint of this enormity." The attempt to bring the grant under what we should call the police power is evident.

natural or artificial, that need no defence but sally from beneath its ægis to injure society.

How far does our legal system contain the power to meet these new conditions? We must admit that it has shown a marvelous power of regeneration in the past. From Richard II to Elizabeth, the rise of the court of chancery preserved it from medieval dry rot. Under James I and Charles I, the indefatigable zeal and uncompromising dogmatism of Coke saved it from subversion by royal authority. At the opening of the eighteenth century the outlook was dark. The modern business world was springing up, and the law made no provision for its needs beyond a few obsolete rules framed for itinerant pedlers. But the common law rose to the occasion. It took over the custom of merchants, changed it from fact to law, and on that basis built a solid structure of case-law that has endured. In America, after the Revolution, it had to contend with the odium of its English origin. Kentucky legislated against it.[1] Kent did not venture to cite its authorities in New York, and was driven to justify his decisions out of French treatises.[2] Yet the common law prevailed, and before the century was over, the decisions construing the XIV Amendment had completed the work of fortifying it in our constitution. Hence the common-law lawyer need not despair. He should only look about him to find within our law the means of bringing it once more abreast of the time and of ranging it where it belongs,—on the side of the people. Indeed, the law has already discovered them, and is already moving in the right direction. The residuary power of the crown to do justice among his subjects has served to meet two crises in our legal history. When the old polity of local courts became impossible, it gave us the king's courts and the common law. When the common law was in danger of fossilizing, it gave us equity. To-day, when the sovereign people stands in the shoes of the sovereign king as *parens patriæ*, this residuary authority has given us the police power. Not yet one hundred years old,[3] and

[1] See Reporter's note to Littel's Select Cases.

[2] Memoirs and Letters of Chancellor Kent 117.

[3] The phrase was first used in Brown *v.* Maryland (1827) 12 Wheat. 419.

scarcely mentioned in the books until the last twenty-five years, this doctrine has been worked out slowly at the same time that the common law has been gaining its firm foothold in our constitutional law. It is furnishing the antidote for the intense regard for the individual which our legal system exhibits. And it is in the right line of our legal history and in full accord with the genius of our system to absorb and assimilate this principle as it absorbed and assimilated equity. In fact a progressive liberalizing of our constitutional law is noticeable already, and to all appearance, a slow but sure change of front is in progress. But changes of front are attended with difficulty. The residuary power is ill-defined, and the common law is jealous of all indefinite power.[1] A compromise is necessary, and the event turns upon this compromise. Fortunately the common law has a saving doctrine to apply to it. Our case-law is not, and Dillon says it never can be—fixed and rigid.[2] Its cardinal doctrine is that law is reason and reason is law.[3] "But," said James I, "have I not reason as well as my judges?" And may not the people say, "have we not reason, as well as our courts?" Let Coke answer:

> "To which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it."[4]

It is in this "artificial reason and judgment of law" that the change must come. No one can read the Second Institute without a profound admiration for Coke. Our debt to him is inestimable. But we must reason with our own reasons and not with his. In his day the medieval scheme of society was decadent and the individual was just coming to his own. We can see now that there was truth in the

[1] Loan Assn. *v.* Topeka (1874) 20 Wall. 655, 662.

[2] Laws and Jurisprudence of England and America 28.

[3] "Nay the common law itself is nothing else but reason." Co. Lit. 97 *b*.

[4] Conference between King James I. and the Judges of England (1612) 12 Rep. 63.

medieval principle of authority. We see now that the Middle Ages were right in holding that the individual depended on something wider and more lasting than himself. But the Middle Ages realized these ideas only in fixed outward organizations. Hence the revolt of the individual was inevitable. This revolt, however, when carried beyond its time and made the basis of a permanent theory of society proves false and dangerous. And those who still repeat its formulas are dealing in ideas of the past which have no application to the present age. Against Coke, then, let us put Hobbes:

"But the doubt is of whose reason it is that shall be received for law. It is not meant of any private reason, for then there would be as much contradiction in the laws as there is in the schools; nor yet, as Sir Edward Coke makes it, an 'artificial perfection of reason, gotten by long study, observation, and experience,' as was his. For it is possible long study may increase and confirm erroneous sentences, and where men build on false grounds, the more they build, the greater is the ruin; and of those that study with equal time and diligence, the reason and the resolutions are, and must remain, discordant, and therefore it is not that *jurisprudentia* or wisdom of subordinate judges; *but the reason of this our artificial man the commonwealth,* and his command that maketh law."[1]

How are we to make this change? How shall we lead our law to hold a more even balance between individualism and socialism? Some suggest packing the bench, and the Chief Justice of North Carolina has given this plan the weight of his great authority.[2] But the hazard involved should make us hesitate to take such a course. It is said that a school boy, asked how commercial carbonic acid gas was made, replied "by burning diamonds in oxygen." "Yes," said the teacher, "that would do it, but don't you think it would be a leetle expensive?" Others suggest codification. But it is not improbable that a code would codify our legal habits of thought as they are and transmit them in a fossil form to the future. To my mind, the remedy is in our law schools. It is in training the rising generation of lawyers in a social, political and legal philosophy abreast of our time. It is a misfortune that students to-day should read the introduction or the opening chapter of the first book of Blackstone's Commentaries except as a

[1] Leviathan, Cap. XXVI. [2] 16 Rep. Va. Bar. Assn. 181.

part of the history of legal and political philosophy. Maitland has shown us how law schools make tough law. "Taught law," he says, "is tough law."[1] But just now this very toughness is a danger to the common law and to the state. It preserves our old legal philosophy and prevents the best educated of our bar from being children of the present. The remedy is a better and sounder philosophy of law than the average practitioner imbibes from Blackstone, or from Coke by way of Story and Cooley and Miller. Note the phrases courts are using in passing on questions of constitutional law. We are told that the liquor traffic is "not an inherent attribute of personal liberty;"[2] that we must distinguish between "legislative" and "natural" rights;[3] that a statute is in "violation of common right";[4] or that it is an "unjust interference" with private contracts.[5] I am no advocate of jurisprudence in the air, nor of systems of juristic metaphysics drawn from the inner consciousness of a German philosopher. But if so many of the states are justified in maintaining law schools, it is because of the close connection of the lawyer with the vital machinery of our society. In view of his relation to a state wherein the most intimate problems of sociology and economics are tried in actions of trespass and suits to enjoin repeated trespasses, must not a philosophy of law founded on a sound knowledge of the elements of the social and political science of to-day form part,—and a necessary part—of the equipment of the trained lawyer?

ROSCOE POUND.

[1] English Law and the Renaissance 18.

[2] Haggard *v.* Stehlin (1892) 137 Ind. 43.

[3] Patton *v.* Patton (1883) 39 Ohio St. 590; *In re* McCabe (1886) 68 Cal. 519.

[4] Milliken *v.* Weatherford (1881) 54 Tex. 388.

[5] State *v.* Fire Creek Coal & Coke Co. (1889) 33 W. Va. 188.